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No. 80-1437

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARMY AND AIR FORCE EXCHANGE SERVICE
PETITIONER

v.

ARTHUR EDWARD SHEEHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent does not take issue with our statement of the general principles applicable to this case. The AAFES is an instrumentality of the United States and therefore shares the government's sovereign immunity. The doctrine of sovereign immunity bars any suit against the government unless the government has consented to be sued, and such consent may not be implied but must be unequivocally expressed. Accordingly, a suit against the government for money damages may not be maintained unless founded upon a constitutional provision, statute, or regulation expressly conferring the right to recover such damages from the United States or upon a lawful contract

obligating the government to pay money. See Pet. Br. 7-8.

In our opening brief, we argued that respondent's action was not based upon any such constitutional provision, statute, regulation, or contract and that his suit had therefore been properly dismissed for lack of subject matter jurisdiction. Respondent's brief does not contend that the requisite waiver of sovereign immunity may be found in a constitutional provision, statute, or regulation. Instead, he claims only that his action was based upon an express or implied-in-fact contract with the AAFES. Respondent's argument, however, clearly lacks merit, not only because it is apparent that no such contract was made, but also because he failed to satisfy his burden of pleading and proving the existence of such a contract when his case was in the district court.

1. Under Fed. R. Civ. P. 8(a), every complaint must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." This provision requires that the complaint allege all facts necessary to show that jurisdiction exists. See, *e.g.*, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Schultz* v. *Cally*, 528 F.2d 470, 474 (3d Cir. 1975); 2A *Moore's Federal Practice* ¶ 8.07[1], at 8-43 & n.5 (2d ed. 1981). Since courts lack jurisdiction to entertain a suit barred by sovereign immunity (*United States* v. *Mitchell*, 445 U.S. 535, 538 (1980)), a complaint against the United States or an agency or instrumentality that shares its sovereign immunity must allege all facts necessary to show a valid waiver of sovereign immunity. See *Vorachek* v. *United States*, 337 F.2d 797, 799 (8th Cir. 1964).

Not only must the plaintiff include such allegations in his complaint but, more important, if jurisdic-

tion is challenged by the defendant or the court sua sponte, the plaintiff bears the burden of proving that jurisdiction exists. See, *e.g.*, *McNutt* v. *General Motors Acceptance Corp.*, *supra*, 298 U.S. at 189; *Familia De Boom* v. *Arosa Mercantil, S.A.*, 629 F.2d 1134, 1138 (5th Cir. 1980), cert. denied, No. 80-1322 (May 18, 1981); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 904 (1st Cir. 1980). The method or form of proof required is a matter within the discretion of the district court. See, *e.g.*, *Gibbs* v. *Buck*, 307 U.S. 66, 71-72 (1939); *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F.2d 1320, 1323-1324 (3d Cir. 1972). The court need not conduct an evidentiary hearing but "may inquire, by affidavits or otherwise, into the facts as they exist." *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). See also, *e.g.*, *Tanzymore* v. *Bethlehem Steel*, *supra*, 457 F.2d at 1322-1324; *Trager* v. *New Rochelle Hospital Medical Center*, 453 F.Supp. 516, 519 n.1 (S.D.N.Y. 1978).

In the present case, respondent utterly failed to discharge his burden of pleading and proving jurisdiction. His complaint made no reference whatsoever to a contract with the AAFES (J.A. 3-10). Even after the AAFES moved to dismiss his complaint for lack of subject matter jurisdiction and noted that he had been "an appointed (non-contract) employee,"[1] respondent did not seek to amend his complaint to allege that he had been employed pursuant to contract. Nor did he submit an affidavit or any other proof. He merely submitted a memorandum of law in opposition to the motion to dismiss, and even there he failed to mention any facts showing that he had been em-

[1] Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment at 8.

ployed under contract.[2] Indeed, his memorandum stopped short of asserting that such a contract had been made.[3] After receiving respondent's submission, the district court dismissed his complaint.

The court of appeals attempted to rescue respondent from his procedural default by holding that "[t]he allegation [in respondent's complaint] that [his] discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (Pet. App. 9a). But since there were no allegations or proof in the record concerning such a "contract," the court was forced to infer its existence and terms solely from AAFES personnel regulations. The court concluded (*id.* at 8a; emphasis in original):

> These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him.

As we noted in our opening brief (Pet. Br. 24), the court of appeals plainly confused a contract implied in fact with a quasi-contract or contract implied in law. And since the Tucker Act does not furnish jurisdiction for claims founded upon quasi-contracts or contracts implied in law (*Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5

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[2] See Memorandum of Authorities in Opposition to Defendants' Motion to Dismiss or in the Alternative, for Summary Judgment.

[3] See *id.* at 5-6.

(1980)), the "contract" found by the court of appeals provided no basis for invoking the jurisdiction of the federal courts.

Respondent contends (Resp. Br. 19) that the court of appeals could not have made the elementary mistake of confusing a contract implied in law or a quasi-contract with a contract implied in fact. But the court of appeals relied solely upon provisions of law—AAFES regulations—in concluding that the AAFES had contracted with respondent. The court made no reference to any facts bearing upon the actual understanding of the parties. Accordingly, it is abundantly clear that the "contract" identified by the court could only be a contract implied in law or a quasi-contract. See Pet. Br. 23-24. Moreover, because the record is devoid of allegations or proof concerning the parties' understanding or intent, there was no rational basis for concluding that the parties had entered into an actual agreement in the form of an implied-in-fact contract. Indeed, as far as the record reveals, both respondent and the AAFES might have expressly acknowledged that respondent was to be employed pursuant to appointment, rather than contract.

The potential implications of the court of appeals' erroneous decision are far-reaching. Because the court relied solely upon AAFES personnel regulations rather than any special facts concerning respondent's case, the court's decision presumably means that all AAFES employees work pursuant to contract. In addition, the court's reasoning provides no basis for distinguishing the AAFES regulations at issue here from other AAFES regulations affecting employees' rights. Thus, if the former regulations "manifest the understanding" of the AAFES and its employees

(Pet. App. 8a), the same is presumably true of the latter. Furthermore, the logic of the court's decision would appear to extend beyond the AAFES and to encompass virtually all federal employees and virtually all federal regulations that bear upon their rights. As a result, according to the court's reasoning, sovereign immunity would not bar any suit against the government for money damages brought by an employee claiming a violation of any such regulations. In short, the court's reasoning would lead to the elimination of a large portion of the government's sovereign immunity.[4] Moreover, as noted in our open-

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[4] Respondent relies (Resp. Br. 16-18, 20-22) upon four cases to demonstrate the correctness of the decision below, but all are readily distinguishable. In *Bodek* v. *Department of the Treasury*, 532 F.2d 277, 279 n.7 (2d Cir. 1976), and *Wolak* v. *United States*, 366 F.Supp. 1106 (D. Conn. 1973), the courts stated that Treasury regulations governing the redemption of United States Savings Bonds and the replacement of stolen bonds form part of the express contract between bondholders and the government. Since there was no express contract between respondent and his employer, those cases have no application here.

In *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518 (5th Cir. 1948), a producer of naval stores brought suit against the government for money allegedly due under the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590a *et seq.* Under that Act, subsidies are paid to eligible producers who comply with certain requirements. The court held that sovereign immunity did not bar the suit for two reasons. First, the court held that since the action was based upon federal statutes and regulations, the Tucker Act waived sovereign immunity. That portion of the decision was overruled by the holding in *United States* v. *Testan*, 424 U.S. 392, 398 (1976), that the Tucker Act does not waive sovereign immunity but merely furnishes jurisdiction for suits to which the government has consented. The court in *Aycock-Lindsey Corp.* also held that the government had entered into an implied

ing brief (Pet. Br. 21-22), that reasoning is fundamentally inconsistent with *United States* v. *Testan*, 424 U.S. 392 (1976).

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contract with the producer because it had "published bulletins and promulgated rules" expressly promising to pay eligible producers who complied with certain requirements (171 F.2d at 521). In the present case, by contrast, the AAFES did not promise expressly or impliedly to pay damages to wrongfully discharged employees. On the contrary, by excluding such employees from the coverage of the Back Pay Act, Congress expressly stated that no such payments would be made. In addition, *Aycock-Lindsey Corp.* did not involve the relationship between the government or a governmental instrumentality and its employees—an area in which appointment, rather than contract, has been the traditional mode of employment (see Pet. Br. 17). For that reason and because the nature of the relationship between the government and its appointed employees has no analog in the government's dealings with private businesses, facts that might justify inferring a contractual relationship in the latter field may not suffice in the former.

Augusta Aviation, Inc. v. *United States*, 500 F.Supp. 785 (S.D. Ga. 1980), involved statutes expressly granting educational benefits to eligible veterans enrolled in approved training. See 38 U.S.C. 1651 *et seq.* The Veterans' Administration first notified a school providing such training that a particular veteran was entitled to substantial benefits but later, after the training was completed, informed the school that the veteran was actually entitled to much less. The school brought suit, and the court held that the Veterans' Administration had impliedly agreed to pay the amount initially indicated. *Augusta Aviation* is distinguishable from this case not only because it arose outside the area of government employment and concerned statutes expressly promising to pay money, but also because it involved a communication that may be construed as an express promise to pay a certain amount to the veteran in question. Moreover, unlike respondent, the plaintiff there adduced substantial evidence to support its contract claim.

2. Respondent contends (Resp. Br. 11-15, 19-23) that even if the court of appeals' reasoning is unsound, its decision nevertheless may be affirmed on two other grounds. First, respondent urges (Resp. Br. 14, 15, 16, 18-19) this Court to find that he entered into a contract with the AAFES when he was accepted into the Executive Management Program. However, as we pointed out in our opening brief (Pet. Br. 18-19), it is apparent from the face of the regulations concerning that program that participants are not employed under contract but are appointed like the vast majority of AAFES and federal employees. Moreover, even if such a contract had been made, respondent's failure to mention it in his district court filings was surely fatal. As noted, respondent had the burden of pleading and proving jurisdiction in the district court.

3. Finally, respondent maintains (Resp. Br. 11-15) that the district court erred in dismissing his complaint for lack of subject matter jurisdiction without conducting an evidentiary hearing. As we have noted, however (see page 3, *supra*), a district court is not obligated to hold such a hearing but may adjudicate the question of jurisdiction using any reasonable method it chooses. In this case, where respondent failed to plead or offer any evidence proving necessary jurisdictional facts, there was plainly no need for an evidentiary hearing. It makes no sense to suggest that the district court was required to conduct such a hearing to determine whether respondent had entered into a contract with his employer when respondent did not even allege that such a contract existed.

Respondent relies upon *United States* v. *Hopkins*, 427 U.S. 123 (1976), but his reliance is clearly mis-

placed.[6] In *Hopkins*, a discharged AAFES employee brought suit for money damages in the Court of

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[6] Respondent's treatment of *United States* v. *Testan*, 424 U.S. 392 (1976), is equally unpersuasive. In our opening brief, we contended (Pet. Br. 19-22) that the decision below cannot be reconciled with *Testan*, in which claims brought against the United States for money damages by federal employees were held to be barred by sovereign immunity. We noted that the complaint in *Testan*, like that here, alleged violations of provisions of law dealing with personnel matters and that neither complaint contained allegations concerning a contract of employment. We reasoned that if an implied-in-fact contract could be inferred in the present case, a similar inference presumably should have been drawn in *Testan*.

In answer to our argument, respondent quotes (Resp. Br. 14) this Court's statement in *Testan* that the plaintiffs "[did] not rest their claims upon a contract" (424 U.S. at 399) and the statement that their action "is not one concerning a wrongful discharge or a wrongful suspension" (*id.* at 402). He then concludes (Resp. Br. 15):

> [T]he implication is clear that a claim upon a contract and a claim for wrongful discharge * * * are substantive rights enforceable against the United States for monetary damages under the Tucker Act.

In our view, half of respondent's conclusion is illogical and incorrect and the rest is beside the point. First, simply because the suit in *Testan* was not one for wrongful discharge or suspension, it does not follow that the Tucker Act would furnish jurisdiction for such a suit. On the contrary, the teaching of *Testan* is that such a suit would be barred unless predicated upon a provision of law containing an express waiver of sovereign immunity. Second, while it is true that sovereign immunity would not bar an action founded upon a lawful contract obligating the United States to pay money, that proposition neither answers our argument based upon *Testan* nor disposes of this case. The issue presented by the decision below is whether any such contract may be properly found based upon the record in this case, and in our opening brief we maintained that inferring the existence of such of contract based solely upon provisions of law concerning personnel matters was inconsistent with the result in *Testan*.

Claims and alleged that he had been employed pursuant to contract. Citing precedent holding that AAFES employees are not federal employees (who generally serve by appointment), Hopkins argued that his relationship with the AAFES was therefore contractual, just like the relationship between employers and employees in the private sector. The Court of Claims accepted his argument (*Hopkins* v. *United States*, 513 F.2d 1360 (1975), thus obviating the need for him to submit any proof concerning the nature of his employment relationship with the AAFES. This Court reviewed the denial of the AAFES' pretrial motion to dismiss and rejected the lower court's reasoning. It concluded that most AAFES employees, like most federal employees, are appointed to their positions (427 U.S. at 127-128). However, the Court noted that certain AAFES regulations authorize a small category of employment or "service contract[s]" for "services performed off a military installation and 'direct services such as janitorial and window cleaning service' " (*id.* at 129, quoting AR 60-20/AFR 147-14, App. A, ¶ A-6*e*). Holding that Hopkins' "allegation that his discharge constituted a breach of a contract of employment was sufficient * * * to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction * * *" (427 U.S. at 130), the Court remanded the case to the Court of Claims with instructions that "the question of whether [Hopkins] was employed by virtue of a contract or by appointment" "depends upon an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case" (*ibid.*).

Although respondent contends that this Court should dispose of his case as it did *Hopkins*, there is

no justification for similar treatment here. First, whereas Hopkins' complaint alleged that his discharge constituted a breach of contract, respondent's complaint contains no such allegation. Second and more important, Hopkins, unlike respondent, had not failed to discharge his responsibility of proving essential jurisdictional facts at the trial level. Because the Court of Claims accepted Hopkins erroneous argument that he had been a contract employee simply because he had not been a federal employee, Hopkins had no occasion to offer whatever proof he might have possessed showing that he was a contract employee in a more conventional sense. Conceivably Hopkins might have possessed a written "service contract" of the type described by this Court. However unlikely it appeared that Hopkins could adduce such proof, the Court obviously felt that it would be unfair to require the dismissal of his suit without at least affording him the opportunity to submit whatever evidence he had.

Respondent, on the other hand, had a full opportunity to plead and prove essential jurisdictional facts but failed to do so. Moreover, respondent had the benefit of this Court's decision in *Hopkins* explaining the nature of employment by the AAFES and the effect of the doctrine of sovereign immunity upon suits such as his. There is consequently no justification for giving respondent a second chance to do what he should have done long ago. In addition, respondent's failure, even at this late date, to refer to any facts substantiating the existence of his alleged contract with the AAFES strongly suggests that he has no such proof and that remanding this case for an evidentiary hearing would be a pointless gesture.

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

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